REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

MISC CIVIL APPLICATION 285 OF 2019

JIMNA MUTHUSI.....APPLICANT/INTENDED APPLICANT

VERSUS

BEATRICE WAIGUMO THUO &

MUTHONI GATHIRA (Suing on their

own behalf and as

administrators of the estate of the late

PETER GACHUGI THUO.....PLAINTIFF/RESPONDENT

RULING

1. This is an application for Review of the ruling of this court dated 19.12.2019 and an order that the defendant deposit Kshs 2m/- in court and Kshs 1m/- to the plaintiff's advocate's account. It is brought under Sections 3 and 3A of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

2. The grounds of the application are that the entire judgement in the lower court was for Kshs 4,301,350 and yet CAP 405 provide that the insurance can only pay up-to a maximum of Kshs 3m/-. It was averred that it was an error on the part of the court to give a ruling that was against the provisions of CAP 405.

3. The application was supported by an affidavit deponed by Isabella Nyambura from the insurance company that insured the suit vehicle. She averred that the orders of this court were to the effect that the defendant/appellant was to pay an amount in excess of Kshs 3m/-.

4. The application was opposed vide a replying affidavit deponed by Teresa Muthoni Gathira, the 2nd respondent on 17.1.2020. She averred that the orders of the court had not been attached to the application hence the application is fatally defective. It was averred that the application did not raise matters for review. It was averred that the trial court was well aware of the provisions of CAP 405 when it passed the judgement and which is not the subject of the intended appeal. It was averred that the applicant had failed to note that the court has inherent powers under Section 3A of the Civil Procedure Act to make orders in the interest of justice.

5. The application was canvassed vide written submissions. Counsel for the applicant submitted that the insurance company should not be forced to pay an amount above that provided for in CAP 405.

6. In reply, counsel for the respondent submitted that the application was brought in bad faith. Reliance was placed on the case of **Pancras T. Swai v Kenya Breweries Ltd (2014) eKLR** that was to the effect that an erroneous conclusion of law is not a ground for review but for an appeal.

7. I have considered the application as a whole and submissions by learned counsel. As can be deduced from the Notice of Motion and submissions, the summary of the applicant's case is that my ruling was an error. On the other hand, the respondent opposes the application arguing that this application is misconceived and bad in law and that there is no error in my said ruling.

8. The issues for consideration are:

a) Whether there are grounds for the court to grant an order of review.

b) Whether the applicant is entitled to the orders sought in the application.

9. It is trite law that just like the right of appeal, an order in review is a creature of statute which must be provided for expressly. In considering an application for review, court exercises its discretion judicially as was held in the case of **Abdul Jafar Devji Vs Ali RMS Devji [1958] EA 558**. The law under which review is provided is section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

10. Order 45 states that :

> *1. (1) Any person considering himself aggrieved—*
>
> *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

11. In order for an application for Review to succeed, the Applicant must convince the court of the existence of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. The applicant is obliged to clearly and specifically state the new evidence or matter and strictly prove the same. In the case **of James M. Kingaru & 17 others v J. M. Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR Visram** *(as he then was)* held as follows: -

> "*Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.*

12. The applicant appears to rely on the 1st and 3rd reasons. Regarding whether there is a mistake or error apparent on the face of the record, examples of such situation could be where a suit proceeds ex-parte when there is no affidavit of service on record or where the court enters a default judgment when there is no affidavit of service. Therefore, a misdirection by a judicial officer on a matter of law cannot be said to be an error apparent on the face of the record. An error apparent on the face of the record was defined in **Batuk K. Vyas Vs Surat Municipality AIR (1953) Bom 133** thus:

> "*No error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it……..."*

13. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it mutates into an appeal.

14. In the case of **Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173** defined an error apparent on the face record, thus:

> "*An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal*."

15. In the instant case therefore, I am not convinced that there is an error apparent on the face of the record in this case. What is being raised by learned counsel for the applicant requires examination of the law and arguments for or against the award of an amount beyond what is in CAP 405. In my considered view it would have instead been an error apparent on the face of the record if I had awarded an amount that was in excess of what was awarded in the trial court. In any case the question as to whether the quantum awarded by the trial court was within the ambit of Cap 405 will be determined in the appeal. This court had only directed that a small fraction be paid to the respondent pending determination of the appeal.

16. Regarding the element of sufficient reason, this means a reason sufficient on ejusdem generis to those in Order 45. In the instant case, a sufficient reason put forward by the applicant is that failure of the court to give a ruling that fits in the gloves of the Insurance Act CAP 405 cannot be visited on the Insurance Company. There is no evidence at all that the Insurance Company was obliged to pay the amount; in any event the ruling is very clear where it stated that the "applicant" was to deposit the sums specified in the ruling where the failure to do so would mean that the stay shall lapse. Furthermore, the order on the deposit of the decretal sums into an interest earning account does not in itself imply that the applicant's insurer will eventually pay up the amount since the same is yet to be determined in the appeal sought to be lodged. The exact amounts due will be determined in the appeal and thus there shouldn't be any anxiety on the part of the applicant's insurers.

17. In view of the foregoing observations, it is my finding that the applicant's application dated 8.1. 2020 lacks merit. The same is dismissed

with costs to the Respondent.

It is so ordered.

Dated and delivered at Machakos this 29th day of May, 2020.

D. K. Kemei

Judge